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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 816

LAWRENCE RASSANO,

Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No.

LAWRENCE RASSANO,

Petitioner,

vs.

ROBERT F. KENNEDY, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Lawrance Rassano, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 26, 1961.

Judgment and Opinions of the Courts Below.

The Memorandum Opinion and the Order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the petitioner's amended complaint, dated May 18, 1961, is not reported, but is set forth in the printed Appendix hereto, and in the certified record transmitted herewith.

The Judgment Order of the United States Court of Appeals for the Seventh Circuit, dismissing the appeal taken thereto, dated December 26, 1961, is not reported but is set forth in the Appendix hereto and in the certified Record transmitted herewith.

Jurisdiction.

The order of the United States Court of Appeals for the Seventh Circuit dismissing the appeal taken thereto was entered on December 26, 1961. This petition is filed within ninety days thereafter. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

Questions Presented.

1. Does an action brought under Section 360(a) of the Immigration and Nationality Act, pending for six months at the time of the enactment of Public Law 87-301, automatically abate under the provisions of the new law?

2. If a petitioner who seeks review of an order of deportation under Public Law 87-301 and claims to be a National of the United States is foreclosed by the terms of that law from determination of the issue of his nationality in an action brought under section 360(a) of the Immigration and Nationality Act of 1952, will that foreclosure be extended to one who not only has not sought such review, but does not qualify to seek such review under Public Law 87-301

3. Will Public Law 87-301, relating to specific classes of people, abate an action by a person to whom it does pretend or purport to relate?

4. When Public Law 87-301 amends the procedure for review of final orders of deportation and exclusion and for determination of nationality claims of persons crimin-

ally charged, but provides for the saving of such actions brought or pending prior to the amendment, will the new law be held to abate an action not within its amendatory provisions?

5. Will Public Law 87-301, by implication, abate an action specifically saved under another valid and subsisting Act of Congress?

STATUTES INVOLVED.

1. Section 360(a) of the Nationality Act of 1952 (8 U.S.C. 1503(a)):

> "If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts."

2. Section 242(a) of the Nationality Act of 1952 (8 U.S.C. 1252(a)):

"Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jursdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release or bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability."

3. Section 405 of the Nationality Act of 1952 (note following 8 U.S.C. 1101):

"(a) Nothing contained in this Act [this Chapter], unless otherwise provided therein, shall be construed to affect the validity of any . . . proceeding at the time this Act [this Chapter] shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, done or existing, at the time this act [this Chapter] shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act [this Chapter] are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ."

4. Public Law 87-301, enacted September 26, 1961, effective October 26, 1961, amending Section 5(a) Title I of the Immigration and Nationality Act (8 U.S.C. 1101):

"Sec. 5.(a) Title I of the Immigration and Nationality Act (8 U.S.C. 1101) is hereby amended by adding the following:

'JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION.

'Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final order of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242 (b) of this Act or comparable provisions of any prior Act, except that—

'(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

'(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

'(3) the action shall be brought against the Immigration and Nationalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay

the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

'(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

'(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360 (a) of this Act or otherwise;

'(6) if the validity of a deportation order has not been judically determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion and in the opinion of the court, a genuine

issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360 (a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

"(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (e) of section 242 of this Act at any time after issuance of a deportation order;

"(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the

court shall review the proceedings on a typewritten record and on typewritten briefs; and

'(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

'(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

'(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.'

"(b) This section shall take effect on the thirtieth day after its approval and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative proceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved en-

tered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) that the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section (other than a habeas corpus or criminal proceeding in which the validity of the deportation order has been challenged) shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. Any judicial proceeding to review an order of exclusion which is pending unheard on the effective date of this section shall be expedited in the same manner as is required in habeas corpus. All laws or parts of laws inconsistent with this section are, to the extent of such inconsistency, repealed. If any particular provision of this section, or the application thereof to any person or circumstance, is held invalid, the remainder of this section and the application of such provision to other persons or circumstances shall not be affected thereby."

STATEMENT OF THE CASE.

This action was commenced by the filing of a complaint on March 22, 1961, alleging, in essence, that the petitioner was born in Bari, Italy, in October of 1912 or 1913, the son of Paul Rassano and Rosa Rassano; that Paolo (Paul) Rassano entered the United States on or about November 1913 and remained a resident of the United States until his death in September 1952; that the petitioner, together with his mother, entered the United States in April, 1914, and both remained residents of the United States to the present date; that Paolo (Paul) Rassano made before a Court of the State of Illinois, his declaration to become a citizen of the United States on or about the year 1918; that, on information and belief, Paolo (Paul) Rassano, became a naturalized citizen of the United States on or before the year 1927, while petitioner was still a minor. It was further alleged that Paolo (Paul) Rassano for 50 years enjoyed and exercised rights, immunities and privileges as a citizen of the United States and of the State of Illinois, and that he was in all respects and to all intents and purposes a citizen of the United States and State of Illinois, and that during all of said period, Paolo (Paul) Rassano represented to petitioner that he was, and held himself out to be, a citizen naturalized in accordance with the acts of Congress. On that assertion, petitioner claims, under the complaint, to be a citizen of the United States pursuant to the provisions of section 5 of the act of March 2, 1907, and that he had been a citizen since on or before the year 1927. It was further alleged that on or about the 27th day of January, 1961, the petitioner was served by Immigration and Naturalization Service with a notice to show cause why

he should not be deported, and that the said Service would proceed to seek and affect the deportation of this petitioner. It was further alleged in the original complaint that the actions of Immigration and Naturalization Service constitute a denial of the right and privilege of the petitioner as a citizen of the United States on the ground that he is not a national of the United States.

The basis for federal jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division, the Court of first instance, was Section 360(a) of the Nationality Act of 1952 (8 U.S.C. 1503(a)).

Thereafter, on the 30th day of March, 1961, the respondent filed a motion to dismiss the complaint alleging as grounds therefor, that the said complaint fails to allege a reasonably sufficient basis for the court's jurisdiction of the action which seeks a declaratory judgment; and that the complaint fails to state a claim upon which relief can be granted pursuant to 8 U. S. C. 1503 (a) "for it acknowledges that there has not been a final administrative denial of any right or privilege as a national of the United States claimed by plaintiff."

Thereafter, on the 11th day of April, 1961, the petitioner filed an amended complaint realleging in substance the matter set forth in the original complaint and further alleging that on or about the 30th day of January, 1961, plaintiff was served with a "warrant for arrest of alien" and taken into custody pursuant to said warrant; that the said warrant issued under the direction of Monte Montal, Acting District Director, Chicago, Illinois, pursuant to and invoking the authority of Section 242 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252 (a)), which said statute provides only for the arrest of persons determined to be aliens, without which said determination the acting district director is without authority

to issue warrants or to take into custody; the amended complaint alleges the determination of the acting district director that the petitioner was an alien, upon which said determination the warrant issued, is non-reviewable, and therefore, constitutes a final determination.[2] The amended complaint further alleges that the petitioner had been released on bond in the amount of $5,000.00 subject to the order of jurisdiction and revocation of the aforesaid acting district director; that the petitioner is informed and believes that said bond issued in the aforesaid amount because the petitioner refused to accept the determination of alienage and refused to carry identification proper only to aliens. The amended complaint further alleges that the setting and fixing of bond is not reviewable administratively and therefore said setting and fixing of bond constitutes a final order. The amended complaint, therefore, claimed that the aforesaid arrest under warrant and the fixing of bond, conditioned upon the discretion and based on the final decision of the acting district director, is a denial of a right or privilege of a citizen of the United States on the ground that he is not a citizen of the United States.

On the request of counsel for the respondent and without objection by the petitioner, the motion to dismiss the original complaint filed March 30, 1961, was allowed to stand as to the amended complaint.

On May 18, 1961, the District Court handed down its memorandum opinion, pursuant to which opinion respondent's motion to dismiss the complaint for declaratory judgment was granted. The memorandum opinion after reciting substantially the facts alleged in the complaint, held:

[2] "While the impact of the statute, 8 U.S.C. Section 1503 (a), on prior decisions is not entirely clear and

the construction to be given it is subject to some question, the court, after careful study, is of the opinion that a final administrative determination of alien status is a condition precedent to the right to a declaratory judgment remedy . . .

"It is therefore apparent that plaintiff's complaint is ill founded in that there has been no final order denying him a right as a national, and that he has not exhausted his administrative remedies. It is true the amended complaint alleges additional administrative action, such as the warrant of arrest of plaintiff, as an alien, which action he states to be final. But the court deems it to be dependent on the main, and as yet undisposed of, deportation hearing. If the deportation proceedings prove ill founded, the warrant for plaintiff's arrest as an alien would also be considered to be unfounded.

"It has been held that a declaratory judgment suit lies in the sound discretion of the court. The court therefore concludes in the exercise of that discretion, plaintiff should be precluded from the maintenance of this suit until its final determination of the deportation proceedings. If plaintiff is correct in his position that he is a United States citizen there will be no need for this action."

On May 21, 1961, the petitioner filed his notice of appeal to the United States Court of Appeal for the Seventh Circuit from the aforesaid judgment and order.

By briefs timely filed, the issues presented on that appeal to the United States Court of Appeals for the Seventh Circuit were as follows:

"1. Whether the complaint and the amended complaint state a cause of action under Section 360 of the Nationality Act of 1952 (8 U.S.C. 1503).

(a). Whether the amended complaint has pleaded a final administrative determination depriving plain-

tiff as a right or privilege as a national of the United States on the ground that he is not a national of the United States.

(b). Whether the right of action created under the section 360 of the Nationality Act of 1952 (8 U.S.C. 1503) is suspended and held in abeyance during the pendency of deportation proceedings.

(c). Whether the court below in dismissing the amended complaint did not invade a legislative prerogative in qualifying the right to institute and prosecute an action under Section 360 of the Nationality Act of 1952.

2. Whether the right to bring an action accorded to this plaintiff by legislative mandate can be denied as an exercise of judicial discretion."

After the filing of petitioner's brief, Public Law 87-301 was enacted and during the pendency of the appeal, on October 26, 1961, went into effect. Also, after the filing of petitioner's brief, a special inquiry officer of the Immigration and Naturalization Service, on September 15, 1961, issued his decision directing petitioner's deportation.

The cause was called on for argument on November 28, 1961 before the United States Court of Appeals for the Seventh Circuit, and upon such argument the contested issues above stated were advanced. The Court of Appeals sitting, *sua sponte*, indicated its conviction that the action before it had abated by virtue of a portion of the new act (Section 5(a) (5)), Public Law 87-301, 75 Stats. 650, No. 15, 1961, United States Code Congressional and Administrative News, Pages 3987-3990), to-wit: "Any such petitioner shall not be entitled to have such issue [of United States nationality] determined under Section 360 (a) of this Act or otherwise."

Supplemental briefs by both parties were filed on the issue thus raised.

On December 26, 1961, the United States Court of Appeals for the Seventh Circuit issued its order dismissing the appeal on the ground that the action had abated by virtue of said Public Law 87-301.

On March 12, 1962, the Board of Immigration Appeals ordered the outstanding order of deportation be withdrawn, the deportation hearing reopened, and the case remanded to the Service for further action.

Reasons for Granting the Writ.

I.

Public Law 87—301 refers only to reviews of final orders of deportation or exclusion and persons criminally charged under Section 242(d) and (e) of the Nationality Act of 1952. There is neither a final order of deportation nor order of exclusion outstanding against petitioner, nor has he been so criminally charged. The Court of Appeals, in holding that Public Law 87—301 abates, without determination of the issues, petitioner's action brought under a valid and subsisting law of the United States (Section 360(a) of the Nationality Act of 1952) has decided an important question of federal law, that has not been, but should be, settled by this Court.

Section 106(a) (Public Law 87-301) provides in pertinent part as follows:

> "(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961, 5 U.S.C. 1031 et seq.), shall apply to and shall be the sole and exclusive procedure for, the judicial review of *all final orders of deportation* heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this act or comparable provisions of any prior act, except that—
>
> "(1) [provides for time limitation on bringing review action]
>
> "(2) [provides for venue of such review proceedings]
>
> "(3) [provides for named respondent and service of notice of the pendency of the suit]
>
> "(4) [provides for scope of review]
>
> "(5) Whenever any *petitioner, who seeks review of an order under this section,* claims to be a na-

> tional of the United States and makes a showing that his claim is not frivolous, the Court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceeding to a United States District Court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the District Court under the provisions of Section 2201 of Title 28, U.S.C. *Any such petitioner shall not be entitled to have such issue determined under Section 360(a) of this act or otherwise;*" (Emphasis and bracketed material supplied).

That the section is inapplicable is obvious from the fact that this is not a procedure for judicial review of the final order of deportation; from the fact that this is not "any such petitioner", in that this petitioner has not sought a review of an order under Section 106. He is not "any such petitioner", nor could he be one for no final order of deportation has issued as to him. The restriction on entitlement to bring an action under Section 360(a) of the Immigration and Nationality Act of 1952 applies only to a person who has already sought review of a final order of deportation and to one criminally charged under Sections 242(d) and (e) of the Act (8 U.S.C. 1252 (d) and (e)). See Section 106 (a)(6). There is no reason why, if a petitioner, other than the two classes specifically so restricted meets the qualification of Section 360(a), that course is not open to him even at the present time. That section has not been repealed either expressly nor by implication.

Section 360(a) of the Immigration and Nationality Act of 1952 retains the force that it had prior to the passage

of the new Act. We submit that anyone who can show deprivation of a right or privilege as a national of the United States on the ground he is not a national of the United States, which deprivation is final, is entitled to bring a declaratory judgment action under the later stated statute. We submit that the Immigration and Nationality Service, having taken petitioner into custody and having subjected him to restraints under the authority of 8 U.S.C. 1252(a), has made a determination of alienage which is non-reviewable and that, therefore, there has been pleaded in the amended complaint a final administrative denial of a right or privilege of a national of the United States on the ground that the petitioner is not a national and a cause of action under 8 U.S.C. 1503(a).

II.

Public Law 87—301 makes provision for continuation of all actions within the scope of its amending provisions, pending as of the time of its effective date. No such action abates under the terms of the new law. The Court of Appeals, in abating an action not covered by the terms of the new act and specifically protected against abatement by a valid and subsisting Act of Congress (Section 405(a) of the Immigration and Nationality Act of 1952), has decided an important question of federal law that has not been, but should be, settled by this Court.

Section 405 of the Immigration and Nationality Act contains a general savings clause providing in pertinent part as follows:

> "(a) Nothing contained in this Act [this Chapter], unless otherwise provided therein, shall be construed to affect the validity of any . . . proceeding at the time this Act [this Chapter] shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, done or existing, at the time this

> act [this Chapter] shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act [this Chapter] are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ." Note following 8 U.S.C. 1101.

Illustrative of the broad interpretation given the above provision of law, see *Wong Kay Suey* v. *Brownell*, C.A.D.C., 227 F. 2d 41, cert. den. 350 U.S. 969; *Dulles* v. *Richter*, C.A.D.C., 246 F. 2d 709; *United States* v. *Menasche*, 348 U.S. 528, which the 9th Circuit in *Sunda* v. *Dulles*, 224 F. 2d 908 interpreted as deciding that under the foregoing savings clause the "litigation continued as though the Act did not exist" (p. 909).

That savings clause would appear conclusive were it not for the addendum to Section 106, which provides in pertinent part that

> "(b) This section shall take effect on the thirtieth day after its approval (approved September 26, 1961) and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative proceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved entered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) that the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. . . ."

We submit this portion of the Amendment to be inapplicable, since we are not concerned with any administrative proceeding, but with a non-reviewable ex parte

administrative determination. We are not here concerned with any administrative proceeding, but with a court or judicial proceeding.

Further, there is no provision of law in Section 106 relating to the cause at bar. Nothing in the new section provides for administration or adjudication of controversies arising from Section 242(a) of the Immigration and Nationality Act of 1952. (Note that subsections (a)(1) through (5) relate only to Section 242 (b); subsection (a)(6) relates to Section 242 (d) and (e); subsection (b) relates to exclusion under Section 236.)

By way of specifically limiting the savings clause (§ 405, which provides that otherwise "litigation continued as though the Act did not exist" (224 F.2d at 909), the Addendum makes the following *specific* provisions:

> ". . . Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section [October 26, 1961] (other than a habeas corpus or criminal proceeding in which the validity of the deportation order has been challenged) shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. Any judicial proceeding to review an order of exclusion which is pending unheard on the effective date of this section shall be expedited in the same manner as is required in habeas corpus. . . ."

Thus, an unheard petition to review an order of deportation is transferred to the Court of Appeals as though filed under this Act; a petition to review an order of exclusion is merely accelerated as though filed as a petition for a writ of habeas corpus. Even the

specific provisions do not allow an action to abate, and only specific exemptions will exclude this action from the expansive savings clause of Section 405. This action is not encompassed therein. It should have continued as though the Act did not exist.

CONCLUSION.

This petitioner presented substantial issues for determination by the Court of Appeals for the Seventh Circuit, urging his amended complaint had been wrongfully dismissed. Petitioner urged to that Court, principally, (*a*) that an administrative denial of his right to freedom of locomotion and his right to freedom from restraint (which are non-reviewable) and which restrictions were imposed under authority of Section 242(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252(a)), providing for arrest of *aliens,* are each a final denial of a right or privilege of one who claims to be a National of the United States on the ground he is not a National, and that the action was proper under Section 360(a) of the Act (8 U.S.C. 1503 (a)); (*b*) that the right to bring an action accorded to this petitioner by legislative mandate cannot be denied as an exercise of judicial discretion, which was one of the bases of the dismissal of the amended complaint in the District Court. Because of the summary dismissal of the Appeal by the Seventh Circuit, these, and the other issues presented, have not been ruled on or resolved.

It is our respectful submission that summary abatement of this action under the authority of Public Law 87-301 is contrary to the letter of that law and other valid, subsisting law, and contrary to the spirit of the Immigration and Nationality Act. The writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
ANNA R. LAVIN,
Attorneys for Petitioner.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

LAWRENCE RASSANO,
Plaintiff,
vs.
ROBERT J. KENNEDY, Attorney General of the United States,
Defendant.
No. 61 C 499

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT.

This is an action for declaratory judgment by Lawrence Rassano against the United States Attorney General for a declaration that he is a United States citizen. In his amended complaint he alleges that he was born in Bari, Italy, in October 1912 or 1913, the son of Paolo (Paul) Rassano, who entered the United States about November, 1913, and remained here until his death in September, 1952. Plaintiff further states that he came to the United States with his mother in April, 1914, and they have both been here since. In 1918, when plaintiff was five, or six, his father made his declaration in Illinois to become a citizen, and he believes his father became naturalized in, or before, 1927, while plaintiff was still a minor, and his father for fifty years held himself out to be a citizen.

On January 26, 1961, plaintiff was served with an order to show cause by the Immigration and Naturalization Service, why he should not be deported, and the hearing was set on March 31, 1961, at which time the Service would seek his deportation, thereby denying him the privileges of a United States citizen. He states he has never expatriated himself, and therefore seeks a declaration of his citizenship.

On January 30, 1961, he was taken into custody under a warrant of arrest of an alien, and released on a $5,000 bond. The issuance of the warrant is alleged to be a final, non-reviewable action. He sought a restraining order on March 28, 1961, of the deportation proceedings.

Plaintiff also alleges that the second conviction for a then non-deportable offense, which forms the alleged basis for the deportation proceedings, was on March 23, 1952, and he was released from probation thereunder on October 26, 1953. He was married to a native citizen in 1943, had two native-born children, now aged 17 and 13. His wife has passed away.

The United States on March 30, 1961, filed a motion to dismiss the complaint (since amended) for failure to state a legally sufficient basis for the court's jurisdiction and failure to state a claim under 8 U.S.C. § 1503(a) because there has been no final administrative determination of any right of plaintiff as a national of the United States.

While the impact of the statute, 8 U.S.C. § 1503(a), on prior decisions is not entirely clear and the construction to be given it is subject to some question, the Court, after careful study, is of the opinion that a final administrative determination of alien status is a condition precedent to the right to a declaratory judgment remedy.

Thus it was held in *Louis Chen Sun* v. *Brownell*, 127 F. Supp. 684 (D.C. N.Y. 1955):

> "Where no administrative decision had yet been rendered against one in a deportation proceeding which had been instituted against him, he had not exhausted his administrative remedies and was not entitled to seek statutory judicial relief."

In *Vergas* v. *Shaughnessy*, 97 F. Supp. 335, 338, (D.C. N.Y. 1951), it was said (dictum):

> "That one resisting an order of deportation is no longer confined to habeas corpus but may maintain a

declaratory judgment suit after having exhausted administrative remedies is no longer open to question. However, the maintenance of such an action is not absolute but is dependent upon 'the existence of a justiciable case or controversy.'

The United States Supreme Court in *McGrath, Attorney General* v. *Kristensen*, 340 U.S. 162 (1950), held that there was a justiciable question in an action by an alien for a judgment declaring that an official, in passing on the alien's application for suspension of deportation under § 19(c) of the Immigration Act, must act on assumption that he is eligible for naturalization. It was further held that an administrative decision against a requested suspension of deportation can be challenged in a suit for a declaratory judgment, and that the provision of the Immigration Act making the Attorney General's decision "final" does not preclude judicial review by declaratory judgment of the question of eligibility for citizenship. The United States Supreme Court headnote on page 162 states:

> "Where an official's authority to act depends upon the status of the person affected, that status, when in dispute, *may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies.*" (Emphasis ours.)

The statute (8 U.S.C. § 1503 (a)) itself provides that

> "If any person who is within the United States claims a right or privilege as a national of the United States and *is denied* such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action . . . against the head of such department . . . for a judgment declaring him to be a national of the United States. . . . Any action under this subsection may be instituted *only* within five years after the *final administrative denial* of such right or privilege . . ." (Emphasis ours.)

In *Ferretti* v. *Dulles*, 246 F. 2d 544 (2nd Cir. 1957), a suit was brought for declaratory judgment that a woman was a national of the United States. She had been born here but went to Italy as an infant and voted there. The Court held that the complaint was insufficient to state a cause of action and that where she did not resort to administrative remedies, her effort to obtain judicial review of agency action was premature. The Court said (pp. 546-7):

> "Only after she had made such a claim and it had been denied on the ground that she was not a national of this country would she have been deprived of any right or privilege she may have had as such a national. . . .
>
> "Moreover, she did not resort to the administrative remedies provided in subsection (b) and (c) of Section 1503 of Title 8 U.S.C.A. . . . Not having exhausted her administrative remedies, her effort to obtain judicial review of agency action is now premature."

The Court also said (p. 547):

> "Nor does the Declaratory Judgment Act by itself provide a remedy for the appellant. That statute created new procedural remedies without enlarging the jurisdiction of federal courts. . . . And of course the appellant must exhaust her administrative remedies before she can present a final administrative action reviewable under the provisions of the Administrative Procedure Act. She has not done that."

The court held in that case that the woman had not alleged "any denial, on the ground that she was not a national of this country, of a right or privilege she had as a national of the United States; that no claim upon which relief could be granted under any of the above statutes was stated in the complaint" and therefore there was no action under §1503(a) and the other statutes.

In *Lew Hsiang* v. *Brownell*, 234 F.2d 232 (7th Cir. 1956), the Court of Appeals affirmed the dismissal of a declaratory judgment action seeking determination of citizenship, stating:

> "As we read § 503 in the Nationality Act of 1940 . . . vitality for actions flowing from that provision springs from denials of claimants' rights or privileges as Nationals of the United States. But it was with the 1955 decision that plaintiffs' asserted rights as alleged United States Nationals were ultimately denied. They had expressly agreed eligibility determinations would await them at the port of San Francisco. Instead of denials; as in the passport cases relied upon by plaintiffs in their brief, they received Travel Affidavits. *Once here, however, the contemplated administrative process commenced operation. Without the requisite statutory denial in hand when plaintiffs filed their petition, for declaratory judgment, that jurisdictional defect tainted the proceeding.* Nor can plaintiff erect such a constructive denial out of their detention on arrival, or from a statement of an agent of defendant as would repair that defect. All that went on before the final administrative decision was prologue, not denial. . . . *Without a jurisdictional anchor in 1953, their complaint is unavailing as a remedy, then or now.* In the view we take of this appeal, an elaborate discussion of the various statutory provisions and points raised by plaintiffs is unnecessary." (Emphasis ours.)

In *Correia* v. *Dulles*, 129 F. Supp. 533 (D.C. R.I. 1954), it was said:

> "Under the 'Immigration and Nationality Act' 8 U.S.C.A. § 1101 et seq., which became effective on December 24, 1952, the right to maintain an action for a declaratory judgment of nationality has been *sharply restricted.* . . ." (Emphasis ours.)

Similarly, it was said in *Alvina* v. *Brownell*, 112 F. Supp. 15 (D.C. Tex. 1953), at page 17: "The procedure was changed *radically* by the 'Immigration and Nationality Act.'" In *Antonacci* v. *Brownell*, 133 F. Supp. 201 (D.C. Ill. Judge Briggle, 1955), it was said "Such an action, however, must follow the exhaustion of the administrative remedies." In *Louis Chen Sun* v. *Brownell*, 127 F. Supp. 684 (D.C. N.Y. 1955), the Court said (p. 685):

"Unless and until the plaintiff shall have exhausted his administrative remedies, his status will not have been so defined as to enable him to seek statutory judicial relief. . . . All that is decided on this motion is that the court has not been clothed by the statute with power to interfere with and in effect prevent the Director of Immigration and Naturalization from conducting deportation proceedings. . . . Obviously there is no purpose to foreclose the plaintiff in the exercise of such rights as the law provides, once the deportation proceedings have been finally determined."

In *Linzalone* v. *Dulles*, 120 F. Supp. 107 (D.C. N.Y. 1954), the District Court said: "Obviously a 'final administrative denial' is a prerequisite by virtue of the language of Section 1503(a)."

Among the authorities relied on by plaintiff to support his position is *Kessler* v. *Strecker*, 307 U.S. 22 (1939). That holding is simply that the determination of citizenship is a judicial matter, *i.e.*, the administrative tribunal would have no authority to order deportation if the person involved was a citizen. The case does not bear upon the necessity for a final deportation order prior to the seeking of the declaratory judgment relief. In that case it was held that where no issue of citizenship was raised the administrative order for deportation of an alien made after fair hearing is conclusive and could not be tried *de novo* in a habeas corpus proceeding. *Ex Parte Gross*, 123 F. Supp. 718 (D.C. Cal. 1954), also cited by plaintiff, was a habeas corpus proceeding to test citizenship after a deportation order had been entered and had become final. Habeas corpus was held proper despite the existence of the remedy by declaratory decree. *Frausto* v. *Brownell*, 140 F. Supp. 660 (D.C. Cal. 1956), involved declaratory relief subsequent to administrative determination on exclusion for expatriation. *United States* v. *Watkins*, 165 F.2d 1017 (C.C.A. 2, 1948), was a habeas corpus proceeding by one who claimed to be a citizen, but lost the same by long residence abroad. The Court stated (p. 1018):

"Though the Board of Special Inquiry had no jurisdiction to exclude if he were a citizen and though it may well be that his certificate of citizenship could be cancelled only in judicial proceedings conforming to the statute, *the facts upon which his status depended were in the first instance* for the administrative determination of the Board. . . ." (Emphasis ours.)

Tijerina v. *Brownell*, 141 F. Supp. 266 (D.C. Tex. 1956), did not involve a co-pending and unresolved administrative proceeding wherein the issue of citizenship was under consideration. *Strupp* v. *Dulles*, 258 F.2d 622 (2nd Cir. 1958), simply decided that it was immaterial whether the denial of the status of citizenship occurred while the person was within or without the United States. The opinion points out the administrative action of denial.

It is therefore apparent that plaintiff's complaint is illfounded in that there has been no final order denying him a right as a national, and that he has not exhausted his administrative remedies. It is true the amended complaint alleges additional administrative action, such as the warrant of arrest of plaintiff as an alien, which action he states to be final. But the Court deems it to be dependent on the main, and as yet undisposed of, deportation hearing. If the deportation proceedings prove illfounded the warrant for plaintiff's arrest as an alien would also be determined to be unfounded.

It has been held that a declaratory judgment suit lies in the sound discretion of the court. The court therefore concludes in the exercise of that discretion plaintiff should be precluded from a maintenance of this suit until a final determination of the deportation proceeding. If plaintiff is correct in his position that he is a United States citizen, there will be no need for this action.

The motion to disiniss is granted.

Edwin A. Robson
Judge

May 18, 1961

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois
December 26, 1961

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

LAWRENCE RASSANO *Plaintiff-Appellant,* No. 13375 vs. ROBERT F. KENNEDY, Attorney-General of the United States, *Defendant-Appellee.*	}	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This case having regularly come on for oral argument, during which it appeared to the court that the judgment of the district court, from which this appeal was taken, was entered in a proceeding commenced by the filing of a complaint by Lawrence Rassano purporting to be pursuant to the provisions of Section 360 of the Nationality Act of 1952, 8 U.S.C.A. § 1503, and, it now appearing that parts of said 1952 Act, and other acts, were amended by Public Law 87-301 approved September 26, 1961, pertaining to the procedure in such a case as the one at bar, and that Section 106 (a) was added thereby to 8 U.S.C.A. 1101 and provides:

> "• • • Any such petitioner shall not be entitled to have such issue determined under section 360 (a) of this Act or otherwise; • • •."

And the court having considered supplemental briefs and arguments filed by the respective parties and being fully advised in the premises, IT IS ORDERED that this appeal be and the same is hereby dismissed at appellant's costs, without prejudice to the rights of either party in any other pending proceeding.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 816

LAWRENCE RASSANO, PETITIONER

v.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a) is not yet reported. The memorandum opinion of the district court appears in Pet. App. 1a-7a.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1961 (Pet. App. 8a). The petition

for a writ of certiorari was filed on March 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action under Section 360(a) of the Immigration and Nationality Act of 1952 by a person against whom deportation proceedings are pending, to have a claim of citizenship determined prior to the termination of the deportation proceedings, was properly held abated by reason of the enactment of the Act of September 26, 1961, providing a different form of judicial review of issues of citizenship determined in deportation proceedings.

STATUTES INVOLVED

The applicable statutes provide in pertinent part as follows:

1. Section 5 of the Act of September 26, 1961, 75 Stat. 651 (8 U.S.C. (Supp. III) 1105 (a)):

> (a) The procedure prescribed by, and all provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 *et seq.*) shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act, except that—
>
> * * * *

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

* * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

* * * * *

2. Section 5(b) of the Act of 1961, *supra*:

This section shall take effect on the thirtieth day after its approval and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative pro-

ceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved entered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) that the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section (other than a habeas corpus or criminal proceeding in which the validity of the deportation order has been challenged) shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. Any judicial proceeding to review an order of exclusion which is pending unheard on the effective date of this section shall be expedited in the same manner as is required in habeas corpus. All laws or parts of laws inconsistent with this section are, to the extent of such inconsistency, repealed. If any particular provision of this section, or the application thereof to any person or circumstance, is held invalid, the remainder of this section and the application of such provision to other persons or circumstances shall not be affected thereby.

3. Section 360(a) of the Nationality Act of 1952 (8 U.S.C. 1503(a)):

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or

official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

STATEMENT

On January 26, 1961, petitioner was served by the Immigration and Naturalization Service with an order to show cause why he should not be deported. Pursuant to a warrant issued under the immigration laws, petitioner was taken into custody by immigration authorities, as an alien. He was released on $5,000 bond (Pet. 12-13).

In an amended complaint filed in the United States District Court for the Northern District of Illinois under Section 360(a) of the Nationality Act of 1952, *supra*, pp. 4-5, he sought a declaratory judgment that he was a United States citizen by virtue of the na-

turalization of his father while petitioner was a minor. The right to bring the action under Section 360(a) was predicated on the allegation that the commencement of deportation proceedings and the arrest under the immigration warrant applicable only to an alien were a denial of a right or privilege of a citizen of the United States on the ground that he was not a citizen (Pet. 10-11). The government moved to dismiss the complaint for failure to show that a final administrative order had been issued, as required by Section 360(a). The district court granted the motion, pointing out that no final order as to deportation had as yet been issued, and that the validity of the warrant of arrest, which was merely preliminary to the deportation hearing, was dependent on the outcome of the deportation hearing (Pet. App. 1a-7a). The court of appeals dismissed without prejudice the appeal from the order of the district court, holding that petitioner's action, under Section 360(a), had abated in October 1961, when Section 5(a) of the Act of 1961 (enacted in the interim) became effective, since that section provided that an action under Section 360(a) would no longer lie to review issues of nationality determined in deportation proceedings.

On September 15, 1961, the Immigration and Naturalization Service had found petitioner deportable (Pet. 14). On appeal, the Board of Immigration Appeals, on March 12, 1962, remanded the case to the special inquiry officer of the Service because it felt that the evidence was insufficient to show that petitioner had not acquired derivative citizenship. The

case is now pending before the Service for a new hearing (Pet. 15).

ARGUMENT

Section 5(a)(5) of the Act of September 26, 1961 clearly and unequivocally provides that, where a question of American nationality is involved in a deportation proceeding, "such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise." *Supra*, p. 3. Section 5(b) of the 1961 Act makes that law applicable to all administrative proceedings, even if commenced or conducted prior to the effective date of the 1961 law. *Supra*, pp. 3-4. The issue of petitioner's nationality is necessarily involved in the deportation proceedings which have not yet been concluded. If a final order of deportation should be issued—and at this juncture it cannot be known whether or not an order will issue—petitioner will have the full right of judicial review provided in the 1961 Act. He has no such right now since Section 5 provides for judicial review only of final orders of deportation. The court of appeals therefore properly held that, in view of the provisions of Section 5 of the 1961 Act, petitioner's action under Section 360(a) of the Nationality Act of 1952 had abated.

Petitioner argues that, since he predicated his action under Section 360(a) on the claimed denial of a right of citizenship involved in the mere fact of arrest as an alien—without regard to the deportation proceeding—his right of action should not be deemed to have been affected by the 1961 Act which, as noted,

applies only to final orders of deportation. However, the 1961 Act, in specifically making its provisions applicable to all administrative proceedings then pending, indicates the intention to have all issues of nationality involved in deportation proceedings determined in the manner provided by the new Act. The whole purpose of the Act would be defeated if the issue of nationality could be litigated prior to the termination of deportation proceedings by the simple device of alleging that incidental aspects of the proceeding were themselves the subject of separate judical review.[1]

Moreover, even without regard to the provisions of the 1961 Act, petitioner's appeal was properly dismissed since his cause of action was premature. The mere fact of arrest as an alien for the purpose of holding a hearing which will ultimately determine, *inter alia*, whether petitioner is an alien is not the kind of denial of a right as a citizen which will support an action for judicial review prior to the termination of the administrative proceeding. This Court so decided long ago in *United States* v. *Sing Tuck*, 194 U.S. 161, where a group of Chinese, held by immigration authorities when they attempted to enter the country, sought to have their claim of citizenship decided by a court in habeas corpus proceedings before exercising their right of appeal to the Secretary of Commerce and Labor. In overruling their right to test the issue at such time, this Court said that it was "one of the necessities of the admin-

[1] It is clear that the arrest here was part and parcel of the deportation proceeding.

istration of justice that even fundamental questions should be determined in an orderly way". Recognizing that, if the allegations of the petition were true, "the petitioner theoretically is entitled to his liberty at once", the Court held that nevertheless "a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right". (194 U.S. at p. 168). See also *Florentine* v. *Landon*, 206 F. 2d 870 (C.A. 9), certiorari denied, 347 U.S. 927.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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